H

Supreme Court of the United States

FEDERAL COMMUNICATIONS COMMISSION,
Petitioner,
v.
MIDWEST VIDEO CORPORATION et al.
AMERICAN CIVIL LIBERTIES UNION,
Petitioner,
V.
FEDERAL COMMUNICATIONS COMMISSION et al.
NATIONAL BLACK MEDIA COALITION et al.,
Petitioners,
v.
MIDWEST VIDEO CORPORATION et al.

Nos. 77-1575, 77-1648 and 77-1662.

Argued Jan. 10, 1979.
Decided April 2, 1979.

The Federal Communications Commission promulgated rules requiring certain cable television systems to develop, at a minimum, 20-channel capacity by 1986, to make available certain channels for access by third parties, and to furnish equipment and facilities for access purposes. On petition for review, the Court of Appeals for the Eighth Circuit, 571 F.2d 1025, set aside Commission's access, channel capacity, and facilities rules as beyond agency's jurisdiction, and certiorari was granted. The Supreme Court, Mr. Justice White, held that rules promulgated by FCC were not within its statutory authority.

Affirmed

Mr. Justice Stevens filed a dissenting opinion in which Mr. Justice Brennan and Mr. Justice Marshall joined.

West Headnotes

[1] **Telecommunications** 383
372k383

In enacting Communications Act of 1934, Congress meant to confer broad authority on the Federal Communications Commission so as to maintain, through appropriate administrative control, a grip on the dynamic aspects of radio transmission. ('ommunications Act of 1934, § 1 et seq., 47 U.S.C.A. § 151 etseq

[2] **Telecommunications** 435

"Fairness doctrine" does not require that broadcaster provide common carriage, but it contemplates a wide range of licensee discretion. Conmiunications Act *of* 1934, § 3(h), 47 U.S.C.A. § 153(h).

[3] **Telecommunications** 383

Section of Communications Act of 1934 directing Federal Communications Commission not to treat persons engaged in broadcasting as common carriers was intended to preclude Commission discretion to compel broadcasters to act as common carriers, even with respect to a portion *of* their total services. Communications Act **of** 1934, § 3(h), 47 U.S.C.A. § 153(h).

[4] **Telecommunications** 457(2)
372k457(2)
(Formerly 372k449.5(4.1), 372k449.5(4), 372k449)

Federal Communications Commission rules requiring certain cable television systems to develop, at a minimum, 20-channel capacity by 1986, to make available certain channels for access by third parties, and to furnish equipment and facilities for access purposes were not reasonably ancillary to effective performance of Commission's various responsibilities for regulation of television broadcasting and were not within Commission's statutory authority under Communications Act **of** 1934, as FCC could not regulate cable systems as common carriers. Communications Act of 1934, § § 2(a), 3(h), 47 U.S.C.A. § § 152(a), 153(h).

[5] **Telecommunications** 457(1)
372k457(1)
(Formerly 372k449.5(1), 372k449)

Federal Commnnications Commission may not regulate cable television systems as common carriers, just as it may not impose such obligations on television broadcasters. Communications Act of 1934, § 3(h), 47 U.S.C.A. § 153(h).

***1436 *689** *Syllabus* [FN*]

FN* The syllabus constitutes no part of the

opinion of the Court hut has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

The Federal Communications Commission (FCC) promulgated rules requiring cable television systems that have 3,500 or more subscribers and carry broadcast signals to develop, at a minimum a 20-channel capacity by 1986, to make available certain channels for access by public, educational, local governmental, and leased-access users, and to furnish equipment and facilities for access purposes. Under the rules, cable operators are deprived of all discretion regarding who may exploit their access channels and what may he transmitted over such channels. During the rulemaking proceedings, the FCC rejected a challenge to the rules on jurisdictional grounds, maintaining that the rules would promote "the achievement of long-standing communications regulatory objectives by increasing outlets for local self-expression and augmenting the public's choice of programs." On petition for review, the Court of Appeals set aside the FCC's rules as beyond the agency's jurisdiction. The court was of the view that the rules amounted to an attempt to impose common-carrier obligations on cable operators, and thus ran counter to the command of § 3(h) of the Communications Act of 1934 that "a person engaged in . . . broadcasting shall not . . . he deemed a common carrier." *Held* : The FCC's rules are not "reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting." *United States v. Southwestern Cable Co.*, 392 U.S. 157. 178. 88 S.Ct. 1994, 2005, 20 L.Ed.2d 1001, and hence are not within the FCC's statutory authority. Pp. 1439-1446.

(a) The FCC's access rules plainly impose common-carrier obligations on cable operators. *United States v. Midwest Video Corp.*, 406 U.S. 649, 92 S.Ct. 1860, 32 L.Ed.2d 390, distinguished. Under the rules, cable systems are required to hold out dedicated channels on a first-come, nondiscriminatory basis; operators are prohibited from determining or influencing the content of access "**690** programming; and charges for access and use of equipment are delimited. Pp. 1441-1442.

(b) Consistently with the policy of the Act to preserve editorial control of programming in the licensee, § 3(h) forecloses any discretion in the FCC to impose access requirements amounting to common-carrier obligations on broadcast systems. The provision's background manifests a congressional belief that the intrusion worked by such regulation on the journalistic integrity of broadcasters would overshadow any benefits associated with the resulting public access. Although § 3(h) does not explicitly limit the regulation of cable systems, Congress' limitation on the FCC's ability to advance objectives associated with public access at the expense of the journalistic freedom of persons engaged in broadcasting is not one having peculiar applicability to television broadcasting. Its force is not diminished by the variant technology involved in cable transmissions. Pp. 1442-1445.

(c) In light of the hesitancy with which Congress has approached the access issue in the broadcast area, and in view of its outright rejection of a broad right of public access on a common-carrier basis, this Court is constrained to hold that the FCC exceeded the limits of its authority in promulgating its access rules. The FCC may not regulate cable systems as common carriers, just as it may not impose such obligations on television broadcasters. Authority to compel cable operators to provide common carriage of public-originated transmissions must come specifically from Congress. Pp. 1445-1446.

571 F.2d 1025, affirmed.

Lawrence G. Wallace, Dept. of Justice, Washington, D. C., for F. C. C. et al.

****1437 *691** George H. Shapiro, Washington, D. C., for Midwest Video corp.

Mr. Justice WHITE delivered the opinion of the Court.

In May 1976, the Federal Communications Commission promulgated rules requiring cable television systems that have 3,500 or more subscribers and carry broadcast signals to develop, at a minimum, a 20-channel capacity by 1986, to make available certain channels for access by third parties, and to furnish equipment and facilities for access purposes. *Report and Order in Docket No.* 20508, 89 F.C.C.2d 294 (*1976 Order*). The issue here is whether these rules are "reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting," *United States v. Southwestern Cable*

Co., 392 U.S. 157. 178. 88 S.Ct. 1994. 2005, 20 L.Ed.2d 1001 (1968), and hence within the Commission's statutory authority.

I

The regulations now uiider review had their genesis in rules prescribed by the Commission in 1972 requiring **all** cable operators in the top 100 television markets to design their systems to include at least **20** channels and to dedicate 4 of those channels for public, governmental, educational, and leased access. The rules were reassessed in the course of further rulemaking proceedings. As a result, the Commission modified a compliance deadline, *Report and Order in Docket No. 20363*, 54 F.C.C.2d 207 (1975), effected certain substantive changes, and extended the rules to all cable systems having 3,500 or more subscribers, *1976 Order, supra*. In its ***692** *1976 Order,* the Commission reaffirmed its view that there was "a definite societal good in preserving access channels, though it acknowledged that the "overall impact that use of these channels can have may have been exaggerated in the **past.**" 59 F.C.C.2d. at 296.

As ultimately adopted, the rules prescribe **a** series of interrelated obligations ensuring public access to cable systems of **a** designated size and regulate the manner in which access is to be afforded and the charges that may be levied for providing it. Under the rules, cable systems must possess a minimum capacity of 20 channels as well as the technical capability for accomplishing two-way, nonvoice communication. [FN1] 47 CFR § 76.252 (1977). Moreover, to the extent of their available activated channel capacity, [FN2] cable systems must allocate four ***693** separate ****1438** channels for use by public, educational, local governmental, and leased-access users, with one channel assigned to each. § 76.254(a). Absent demand for full-time use of each access channel, the combined demand can be accommodated with fewer than four channels but with at least one. § § 76.254(b), (c). [FN3] When demand on a particular access channel exceeds **a** specified limit, the cable system must provide another access channel for the same purpose, to the extent of the system's activated capacity. § 76.254(d). The rules also require cable systems to **make** equipment available for those utilizing public-access channels. § 76.256(a).

FN1. Systems in the top 100 markets and in operation prior to March 31, 1972, and other systems in operation by March 31, 1977, are given until June 21, 1986, to comply with the channel capacity and two-way communication requirements. 47 CFR § 76.252(b) (1977).

FN2. Aclivated channel capacity consists of the number of usable channels that the system actually provides to the subscriber's home or that it could provide by making certain modifications to its facilities. 1976 Order, 59 F.C.C.2d, at 315. The great majority of systems constructed in the major markets from 1962 to 1972 were designed with **a** 12-channel capacity. Often, additional channels may be activated by installing converters on subscribers' home seis, albeit at substantial cost. See *Notice of Proposed Rule Making*, 53 F.C.C.2d 782. 785 (1975).
In determining the number of activated channels available for access use, channels already programmed by the cable operator for which a separate charge is made are excluded. Similarly, channels utilized for transmission of television broadcast signals are subtracted. The remaining channels deemed available for access use include channels provided to the subscriber but not programmed and channels carrying other nonbroadcast prugramniing--such **as** programming originated by the system operator--for which a separate assessment is not made. *1976 Order, **supra,*** at 315-316. The Commission has indicated that it will "not consider **as** acting in good faith an operator with **a** system of limited activated channel capability who attempts to displace existing access uses with his own origination efforts." *Id.*, at 316. Additionally, the Commission has stated that pay entertainment programming should not be "provided at the expense of local access efforts which are displaced. Should a system operator for example have only one complete channel available to provide access services we shall consider it as clear evidence of bad faith in complying with his access obligations if such operator decides to use that channel to provide pay programming." *Id.*, at 317.

FN3. Cable systems in operation on June 21,

1976, that lack sufficient activated channel capacity to furnish one full channel for access purposes may meet their access obligations by providing whatever portions of channels that are available for such purposes. 47 CFR § 76.254(c) (1977). Systems initiated after that date, and existing systems desirous of adding a nonmandatory broadcast signal after that date, must supply one full channel for access use even if they must install converters to do so. See *1976 Order, supra, at 314-315.*

Under the rules, cable operators are deprived of all discretion regarding who may exploit their access channels and what may he transmitted over such channels. System operators are specifically enjoined from exercising any control over the content of access programming except that they must adopt rules proscribing the transmission on most access channels of lottery information and commercial matter. [FN4] § § 76.*694 256(b),S The regulations also instruct cable operators to issue rules providing for first- come, nondiscriminatory access on public and leased channels. § § 76.256(d)(1), (3).

FN4. Cable systems were also required to promulgate rules prohibiting the transmission of obscene and indecent material on access channels. 47 CFR § 76.256(d) (1977). The Court of Appeals for the District of Columbia Circuit stayed this aspect of the rules in an order filed in *American Civil Liberties Union v. FCC,* No. 76-1695 (Aug. 26, 1977). The court below, moreover, disapproved the requirement in the belief that it imposed censorship obligations on cable operators. The Commission bas instituted a review of the requirement, and it is not now in controversy before this Court.

Finally, the rules circumscribe what operators may charge for privileges of access and use of facilities and equipment. No charge may be assessed for the use of one public-access channel. § 76.256(c)(2). Operators may not charge for the use of educational and governmental access for the first five years the system services such users. § 76.256(c)(1). Leased-access- channel users must be charged an "appropriate" fee. § 76.256(d)(3). Moreover, the rules admonish that charges for equipment, personnel, and production exacted from access users "shall he reasonable and consistent with the goal of affording users a low-cost means of television access." § 76.256(c)(3). And "[n]o charges shall he made for live public access programs not exceeding five minutes in length." *Ibid.* Lastly, a system may not charge access users for utilization of its playback equipment or the personnel required to operate such equipment when the cable's production equipment is not deployed and when tapes or film can be played without technical alteration to the svstem's equipment. *Petition for Reconsideration in Docket No. 20508,* 62 F.C.C.2d 399, 407 (1976).

The Commission's capacity and access rules were challenged on jurisdictional grounds in the course of the rulemaking proceedings. In its *1976* ***Order,*** the Commission rejected such comments on the ground that the regulations further objectives that it might properly pursue in its supervision over broadcasting. Specifically, the Commission maintained that its rules would promote "the achievement of long-standing communications regulatory objectives by increasing outlets for *695 local self-expression and augmenting the public's choice of programs." 59 F.C.C.2d, at 298. The Commission did not find persuasive the contention that "the access requirements are in effect common carrier obligations which are beyond our authority to impose." *Id.,* at 299. The explanation was:

> "So long as the rules adopted are reasonably related to achieving objectives for which the Commission has been assigned jurisdiction we do not think they can be **1439 held beyond our authority merely by denominating them as somehow 'common carrier' in nature. The proper question, we believe, is not whether they fall in one category or another of regulation--whether they are more akin to obligations imposed on common carriers or obligations imposed on broadcasters to operate in the public interest--but whether the rules adopted promote statutory objectives." *Ibid.*

Additionally, the Commission denied that the rules violated the First Amendment, reasoning that when broadcasting or related activity by cable systems is involved First Amendment values are served by measures facilitating an exchange of ideas.

On petition for review, the Eighth Circuit set aside the Commission's access, channel capacity, and facilities rules as beyond the agency's jurisdiction. 571 F.2d 1025 (1978). The Court was of the view that the regulations were not reasonably ancillary to the Commission's jurisdiction over broadcasting, a jurisdictional condition established by past decisions

of this Court. The mles amounted to an attempt to impose common-carrier obligations on cable operators, the Court said, and thus ran counter to the statutory command that broadcasters themselves may not be treated as common carriers. See Communications Act of 1934, § 3(h), 47 U.S.C. § 153(h). Furthermore, the Court made plain its belief that the regulations presented grave First Amendment ***696** problems. We granted certiorari, 439 U.S. 816, 99 S.Ct. 77, 58 L.Ed.2d 107 (1978), and we now affirm. [FN5]

FN5. In the court below, the American Civil Liberties Union (ACLU), petitioner in No. 77-1648, challenged the Commission's modification of its 1972 access rules, which were less favorable to cable operators than are the regulations finally embraced. The ACLU requests that we remand these cases for further consideration of its challenge in the event that we reverse the judgment of the Eighth Circuit. As we affirm the judgment below, we necessarily decline the ACLU's invitation to remand.

II

A

[1] The Commission derives its regulatory authority from the Communications Act of 1934, 48 Stat. 1064, as amended, 47 U.S.C. § 151 *et seq.* The Act preceded the advent of cable television and understandably does not expressly provide for the regulation of that medium. But it is clear that Congress meant to confer "broad authority" on the Commission, H.R.Rep.No.1850, 73d Cong., 2d Sess., 1 (1934), so as "to maintain, through appropriate administrative control, a grip on the dynamic aspects of radio transmission." *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 138, 60 S.Ct. 437, 439, 84 L.Ed. 451 (1940). To that end, Congress subjected to regulation "all interstate and foreign communication by wire or radio." Communications Act of 1934, § 2(a), 47 U.S.C. § 152(a). In *United States v. Southwestern Cable Co.*, we construed § 2(a) as conferring on the Commission a circumscribed range of power to regulate cable television, and we reaffirmed that determination in *United States v. Midwest Video Corp.*, 406 U.S. 649, 92 S.Ct. 1860, 32 L.Ed.2d 390 (1972). The question now before us is whether the Act, as construed in these two cases, authorizes the capacity and access regulations that are here under challenge.

The *Southwestern* litigation arose out of the Commission's efforts to ameliorate the competitive impact on local broadcasting operations resulting from importation of distant signals by cable systems into the service areas of local stations. ***697** Fearing that such importation might "destroy or seriously degrade the service offered by a television broadcaster," *First Report and Order, 38* F.C.C. 683, 700 (1965), the Commission promulgated mles requiring CATV systems [FN6] to carry the signals of broadcast stations into whose service area they brought competing signals, to avoid duplication ****1440** of local station programming on the same day such programming was broadcast, and to refrain from bringing new distant signals into the 100 largest television markets unless first demonstrating that the service would comport with the public interest. See ***Second*** *Report and Order*, 2 F.C.C.2d 725 (1966). [FN7]

FN6. CATV, or "community antenna television," refers to systems that receive television broadcast signals, amplify them, transmit them by cable or microwave, and distribute them by wire to subscribers. *United States v. Southwestern Cable Co.*, 392 U.S. 157, 161, 88 S.Ct. 1994, 1996, 20 L.Ed.2d 1001 (1968). "Because of the broader functions to be served by such facilities in the future," the Commission adopted the "more inclusive term cable television systems" in *Cable Television Report and Order in Docket* ***No.*** *18397*, 36 F.C.C.2d 143, 144 n. 9 (1972).

FN7. The validity of the particular regulations issued by the Commission was not at issue in *Southwestern*. See 392 U.S., at 167, 88 S.Ct., at 1090. In dictain *United States v. Midwest Video Corp.*, 406 U.S. 649, 92 S.Ct. 1860, 32 L.Ed.2d 390 (1972), the plurality noted that *Southwestern* had properly been applied by the courts of appeals to sustain the validity of the rules. *Id.*, at 659 n. 17, 92 S.Ct., at 1866.

The Commission's assertion of jurisdiction was based on its view that "the successful performance" of its duty to ensure "the orderly development of an appropriate system of local television broadcasting" depended upon regulation of cable operations. 392

U.S., at 177, 88 S.Ct., at 2005. Against the background of the administrative undertaking at issue, the Court construed § 2(a) of the Act as granting the Commission jurisdiction over cable television "reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting." 392 U.S., at 178, 88 S.Ct., at 2005.

Soon after our decision in *Southwestern*, the Commission "**698 resolved "to condition the carriage of television broadcast signals . . . upon a requirement that the CATV system also operate to a significant extent as a local outlet by originating." *Notice of Proposed Rulemaking and Notice of Inquiry*, 15 F.C.C.2d 417. 422 (1968). It stated that its "concern with CATV carriage of broadcast signals [was] not just a matter of avoidance of adverse effects, but extend[ed] also to requiring CATV affirmatively to further statutory policies." *Ibid.* Accordingly, the Commission promulgated a rule providing that CATV systems having 3,500 or more subscribers may not carry the signal of any television broadcast station unless the system also operates to a significant extent as a local outlet by originating its own programs--or cablecasting--and maintains facilities for local production and presentation of programs other than automated services. 47 CFR § 74.1111(a) (1970). This Court, by a 5 to 4 vote but without an opinion for the Court, sustained the Commission's jurisdiction to issue these regulations in *United States v. Midwest Video Corp.*, ***supra.***

Four Justices, in an opinion by Mr. Justice Brennan, reaffirmed the view that the Commission has jurisdiction over cable television and that such authority is delimited by its statutory responsibilities over television broadcasting. They thought that the reasonably-ancillary standard announced in *Southwestern* permitted regulation of CATV "with a view not merely to protect hut to promote the objectives for which the Commission had been assigned jurisdiction over broadcasting." 406 U.S.. at 667, *02* S.Ct., at 1870. The Commission had reasonably determined, Mr. Justice Brennan's opinion declared, that the origination requirement would " 'further the achievement of long- established regulatory goals io the field of television broadcasting by increasing the nnmber of outlets for community self-expression and augmenting the public's choice ofprograms and types ofservices. . . *Id.*, at 667-668, 92 S.Ct., at 1870, quoting *First Report and Order*, 20 F.C.C.2d 201, 202 (1969). ***699** The conclusion was that the "program-origination rule [was] within the Commission's authority recognized in *Southwestern*." 406 U.S., at 670. 92 S.Ct., at 1872.

The Chief Justice, in a separate opinion concurring in the result, admonished that the Commission's origination rule "strain[ed] the outer limits" of its jurisdiction. *Id.*, at 676. 92 S.Ct., at 1875. Though ****1441** not "fully persuaded that the Commission ha[d] made the correct decision in [the] case," he was inclined to defer to its judgment. *Ibid.* [FN8]

FN8. The Commission repealed its mandatory origination rule in December 1974. It explained:
"Quality, effective. local programming demands creativity and interest. These factors cannot he mandated by law or contract. The net effect of attempting to require origination has been the expenditure of large amounts of money for programming that was, in many instances, neither wanted by subscribers nor beneficial to the system's total operation. In those cases in which the operator showed an interest or the cable community showed a desire for local programming, an outlet for local expression began to develop, regardless of specific legal requirements. During the suspension of the mandatory rule, cable operators have used business judgment and discretion in their origination decisions. For example, some operators have felt compelled to originate programming to attract and retain subscribers. These decisions have been made in light of local circumstances. This, we think, is as it should be." *Report and Order in Docket No. 19988*, 49 F.C.C.2d 1090, 1105-1106.

B

Because its access and capacity mles promote the long-established regulatory goals of maximization of outlets for local expression and diversification of programming--the objectives promoted by the rule sustained in *Midwest Video* --the Commission maintains that it plainly had jurisdiction to promulgate them. Respondents, in opposition, view the access regulations as an intrusion on cable system operations that is qualitatively different from the impact of the rule upheld in *Midwest Video.* Specifically, it is urged that by requiring the allocation of access channels to categories of users

specified by ***700** the regulations and by depriving the cable operator of the power to select individual users or to control the programming on such channels, the regulations wrest a considerable degree of editorial control from the cable operator and in effect compel the cable system to provide a kind of common- carrier service. Respondents contend, therefore, that the regulations are not only qualitatively different from those heretofore approved by the courts but also contravene statutory limitations designed to safeguard the journalistic freedom of broadcasters, particularly the command of § 3(h) of the Act that "a person engaged in . . . broadcasting shall not . . . be deemed a common carrier." 47 U.S.C. § 153(h).

We agree with respondents that recognition of agency jurisdiction to promulgate the access rules would require an extension of this Court's prior decisions. Our holding in *Midwest Video* sustained the Commission's authority to regulate cable television with a purpose affirmatively to promote goals pursued in the regulation of television broadcasting; and the plurality's analysis of the origination requirement stressed the requirement's nexus to such goals. But the origination rule did not abrogate the cable operators' control over the composition of their programming, as do the access rules. It compelled operators only to assume a more positive role in that regard, one comparable to that fulfilled by television broadcasters. Cable operators had become enmeshed in the field of television broadcasting, and, by requiring them to engage in the functional equivalent of broadcasting, the Commission had sought "only to ensure that [they] satisfactorily [met] community needs within the context of their undertaking." 406 U.S., at 670, 92 S.Ct., at 1872 (Brennan, J.).

With its access rules, however, the Commission has transferred control of the content of access cable channels from cable operators to members of the public who wish to communicate by the cable medium. Effectively, the Commission has relegated cable systems, *pro tanto*, to common-carrier ***701** status. [FN9] A common-carrier service in the ****1442** communications context [FN10] is one that "makes a public offering to provide [communications facilities] whereby all members of the public who choose to employ such facilities may communicate or transmit intelligence of their own design and choosing . . . ." *Report and Order, Industrial Radiolocation Service, Docket No. 16106*, 5 F.C.C.2d 197, 202 (1966); see *National Association of Regulatory Utility Comm'rs v. FCC*, 173 U.S.App.D.C. 413, 424, 525 F.2d 630, 641, cert. denied, 425 U.S. 992, 96 S.Ct. 2203, 48 L.Ed.2d 816 (1976); *Multipoint Distribution Service*, 45 F.C.C.2d 616, 618 (1974). A common carrier does not "make individualized decisions, in particular cases, whether and on what terms to deal." *National Association of Regulatory Utility Comm'rs v. FCC*, *supra*, at 424, 525 F.2d, at 641.

FN9. A cable system may operate as a common carrier with respect to a portion of its service only. See *National Associnfion of Regulatory Utility Comm'rs v. FCC*, 174 U.S.App.D.C. 374, 381, 533 F.2d 601, 608 (1976) (opinion of Wilkey, J.) ("Since it is clearly possible for a given entity to carry on many types of activities. it is at least logical to conclude that one can be a common carrier with regard to some activities but not others"); *First Report nnd Order in Docket No. 18397*, 20 F.C.C.2d 201. 207 (1969).

FN10. Section 3(h) defines "common carrier" as "any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio or in interstate or foreign radio transmission of energy . . . ." Due to the circularity of the definition, resort must be had to court and agency pronouncements to ascertain the term's meaning. See *National Association of Regulatory Utility Comm'rs v. FCC*. 173 U.S.App.D.C. 413, 423. 525 F.2d 630. 640, cert. denied, 425 U.S. 992, 96 S.Q. 2203.48 L.Ed.2d 816 (1976); *Frontier Broadcasting Co. v. Collier*, 24 F.C.C. 251, 254 (1958); H.R.Conf.Rep.No.1918, 73d Cong., 2d Sess.. 46 (1934).

The access rules plainly impose common-carrier obligations on cable operators. [FN11] Under the rules, cable systems are required to hold out dedicated channels on a first-come, ***702** nondiscriminatory basis. 47 CFR § § 76.254(a), 76.256(d) (1977). [FN12] Operators are prohibited from determining or influencing the content of access programming. § 76.256(b). And the rules delimit what operators may charge for access and use of equipment. § 76.256(c). Indeed, in its early consideration of access obligation--whereby "CATV operators [would] furnish studio facilities and technical assistance [but] have no control over

program content except as may be required by the Commission's rules and applicable law"--the Commission acknowledged that the result would be the operation of cable systems "as common carriers on some channels." *First Report and Order in Docket No. 18397*, 20 F.C.C.2d, at 207; see *id.*, at 202; *Cable Television Report and Order*, 36 F.C.C.2d 143, 197 (1972). In its *1976 Order*, the Commission did not directly deny that its access requirements compelled common carriage, and it has conceded before this Court that the rules "can be viewed as a limited form of common carriage-type obligation." Brief for Petitioner in No. 77-1575, p. 39. But the Commission continues to insist that this characterization of the obligation imposed by the rules is immaterial to the question of its power to issue them; its authority to promulgate the rules is assured, in the Commission's view, so long as the rules promote statutory objectives.

FN11. As we have noted, and as the Commission has held, cable systems otherwise "are not common carriers within the meaning of the Act." *United States v. Southwestern Cable Co.*, 392 U.S., at 169 n. 29, 88 S.Ct., at 2001; see *Frontier Broadcasting Co. v. Collier*, ***supra.***

FN12. See also *1976 Order*, 59 F.C.C.2d, at 316 ("We expect the operator in general to administer all access channels on a first come, first served non-discriminatory basis").

Congress, however, did not regard the character of regulatory obligations as irrelevant to the determination of whether they might permissibly be imposed in the context of broadcasting itself. The Commission is directed explicitly by § 3(h) of the Act not to treat persons engaged in broadcasting as common carriers. We considered the genealogy and the meaning of this provision in *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94, 93 S.Ct. 2080, 36 L.Ed.2d 772 (1973). "703 The issue in that case was whether a broadcast licensee's general policy of not selling advertising time to individuals or groups wishing to speak on issues important to them violated the Communications Act of 1934 or the First Amendment. Our examination ****1443** of the legislative history of the Radio Act of 1927--the precursor to the Communications Act of 1934--prompted us to conclude that "in the area of discussion of public issues Congress chose to leave broad journalistic discretion with the licensee." 412 U.S., at 105, 93 S.Ct., at 2088. We determined, in fact, that "Congress specifically dealt with--and firmly rejected--the argument that the broadcast facilities should be open on a nonselective basis to **all** persons wishing to talk about public issues." *Ibid.* The Court took note of a bill reported to the Senate by the Conunittee on Interstate Commerce providing in part that any licensee who permits " 'a broadcasting station to be used . . . for the discussion of any question affecting the public . . . shall make no discrimination as to the use of such broadcasting station, and with respect to said matters the licensee shall be deemed **a** common carrier **in** interstate commerce: Provided, that such licensee shall have no power to censor the material broadcast.' " *Id.*, at 106, 93 S.Ct., at 2088, quoting 67 Cong.Rec. 12503 (1926). That bill was amended to eliminate the common-carrier obligation because of the perceived lack of wisdom in " 'put[ting] the broadcaster under the hampering control of being a common carrier' " and because of problems in administering a nondiscriminatory right of access. 412 U.S., at 106, 93 S.Ct., at 2088; see 67 Cong.Rec. 12502, 12504 (1926).

The Court further observed that, in enacting the 1934 Act, Congress rejected still another proposal "that would have imposed **a** limited obligation on broadcasters to turn over their microphones to persons wishing to speak out on certain public issues." 412 U.S., at 107-108, 93 S.Ct., at 2089. [FN13] "Jnstead," the Court noted. ***704** "Congress after prolonged consideration adopted § 3(h), which specifically provides that 'a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier.' " *Id.*, at 108-109, 93 S.Ct., at 2089.

FN13. The proposal adopted by the Senate provided:

"[I]f any licensee shall permit any person to use a broadcasting station in support of or in opposition to any candidate for public office, or in the presentation of views on **a** public question to be voted upon at an election, he shall afford equal opportunity to an equal number of other persons to use such station in support of an opposing candidate for such public office, or to reply to a person who has used such broadcasting station in support of or in opposition to a

candidate, or for the presentation of opposite views on such public questions."
See Hearings on S.2910 before the Senate Committee on Interstate Commerce, 73d Cong., 2d Sess., 19 (1934). The portion regarding discussion of public issues was excised by the House-Senate Conference. See H.R.Conf.Rep.No.1918, 73d Cong., 2d Sess., 49 (1934).

"Congress' flat refusal to impose a 'common carrier' right of access for all persons wishing to speak out on public issues," *id.*, at 110, 93 S.Ct., at 2090, was perceived as consistent with other provisions of the 1934 Act evincing "a legislative desire to preserve values ofprivate journalism" *Id.*, at 109. 93 S.Ct., at 2090. Notable among them was § 326 of the Act; which enjoins the Commission from exercising " 'the power of censorship over the radio communications or signals transmitted by any radio station,' " and commands that " 'no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication.' " 412 U.S., at 110, 93 S.Ct., at 2090, quoting 47 U.S.C. § 326.

[2][3] The holding of the Court in *Columbia Broadcasting* was in accord with the view of the Commission that the Act itself did not require a licensee to accept paid editorial advertisements. Accordingly, we did not decide the question whether the Act, though not mandating the claimed access, would nevertheless permit the Commission to require hroadcasters to extend a range of public access by regulations similar to those at issue here. The Court speculated that the Commission might have flexibility to regulate access, 412 U.S., at 122, 93 S.Ct., at 2096, and that **"705** "[c]onceivably at some future date Congress or the Commission—or the broadcasters--may devise some kind of limited right of access that is both ****1444** practicable and clcsirable," ***id,*** at 131, 93 S.Ct., at 2100. But this is insufficient support for the Commission's position in the present case. The language of § 3(h) is unequivocal; it stipulates that broadcasters shall not he treated as common carriers. **As** we see it, § 3(h), consistently with the policy of the Act to preserve editorial control of programming in the licensee, forecloses any discretion in the Commission to impose access requirements amounting to common-carrier obligations on broadcast systems. [FN14] The provision's background manifests a congressional belief that the intrusion worked by such regulation on the journalistic integrity of broadcasters would overshadow any benefits associated with the resulting public access. It is difficult to deny, then, that forcing broadcasters to develop **a** "nondiscriminatory system for controlling access . . . is precisely what Congress intended to avoid through § 3(h) of the Act." 412 U.S., at 140 n. 9, 93 S.Ct., at 2105, (Stewart, J., concurring); see *id.*, at 152, and n. 2, 93 S.Ct., at 2111 (Douglas, J., concurring in judgment). [FN15]

FN14. Whether less intrusive access regulation might fall within the Commission's jurisdiction, or survive constitutional challenge even if within the Commission's power, is not presently before this Court. Certainly, our construction of § 3(h) does not put into question the statutory authority for the fairness-doctrine obligations sustained in *Red **Lion** Broadcasting Co. **v.** FCC*, 395 U.S. 367, 89 S.Ct. 1794. 23 L.Ed.2d 371 (1969). The fairness doctrine does not require that a broadcaster provide common carriage; it contemplates a wide range of licensee discretion. See *Report **on** Editorializing by Broadcast **Licensees,*** 13 F.C.C. 1246, 1251 (1949) (in meeting fairness-doctrine obligations the "licensee will in each instance be called upon to exercise his best judgment and good sense in determining what subjects should he considered, the particular format of the programs to be devoted to each subject, the different shades of opinion to be presented, and the spokesmen for each point of view").

FN15. The dissent maintains that § 3(h) does not place "limits on the Commission's exercise of powers otherwise within its statutory authority because a lawfully imposed requirement nught be termed a 'common carrier obligation.' " *Post,* at 1447. Rather, § 3(h) means only that "every broadcast station is not to he *deemed* a common carrier, and therefore subject to common-carrier regulation under Title II of the Act, simply because it **is** engaged in radio broadcasting." *Post,* at 1447. But Congress was plainly anxious to avoid regulation of broadcasters as common carriers under Title II, which commands, *inter alia*, that regulated entities shall "furnish . . . communication service upon

reasonable request therefor." 47 U.S.C. § 201(a). Our review of the Act in *Columbia Broadcasting* led us to conclude that § 3(h) embodies a substantive determination not to abrogate a broadcaster's journalistic independence for the purpose of, and as a result of, furnishing members of the public with media access:

"Congress pointedly refrained from divesting broadcasters of their control over the selection of voices; § 3(h) of the Act stands as a firm congressional statement that broadcast licensees are not to be treated as common carriers, obliged to accept whatever is tendered by members of the public. [The] provisio[n] clearly manifest[s] the intention of Congress to maintain a substantial measure of journalistic independence for the broadcast licensee." 412 U.S., at, 116, 93 S.Ct., at 2093.

We now reaffirm that view of § 3(h): The purpose of the provision and its mandatory wording preclude Commission discretion to compel broadcasters to act as common carriers, even with respect to a portion of their total services. **As** we demonstrate in the following text, that same constraint applies to the regulation of cable television systems.

706** Of course, § 3(h) does not explicitly limit the regulation of cable systems. But without reference to the provisions of the Act directly governing broadcasting, the Commission's jurisdiction under § 2(a) would be unbounded. See *United States v. Midwest Video Corp.*, 406 U.S., at 661, 92 S.Ct., at 1867 (opinion of Brennan, J.). Though afforded wide latitude in its supervision over communication by wire, the Commission was not delegated unrestrained authority. The Court regarded the Commission's regulatory effort at issue in *Southwestern* as consistent with the Act because it had been found necessary to ensure the achievement of the Commission's statutory responsibilities. [FN16] Specifically, regulation was imperative*1445** to prevent ***707** interference with the Commission's work in the broadcasting area. And in *Midwest Video* the Commission had endeavored to promote long- established goals of broadcasting regulation. Petitioners do not deny that statutory objectives pertinent to broadcasting bear on what the Commission might require cable systems to do. Indeed, they argue that the Commission's authority to promulgate the access rules derives from the relationship of those rules to the objectives discussed in *Midwest Video.* But they overlook the fact that Congress has restricted the Commission's ability to advance objectives associated with public access at the expense of the journalistic freedom of persons engaged in broadcasting.

FN16. The Commission contends that the signal carriage rules involved in *Southwestern* are, in part, analogous to the Commission's access rules in question here. The signal carriage rules required, *inter alia*, that cable operators transmit, upon request, the broadcast signals of broadcast licensees into whose service area the cable operator imported competing signals. See *First Report and Order in Docket No. 14895,* **38** F.C.C. ***683,*** 716-719 (1965). But that requirement did not amount to a duty to hold out facilities indifferently for public use and thus did not compel cable operators to function as common carriers. See *supra,* at 1441- 1442. Rather, the rule was limited to remedying a specific perceived evil and thus involved a balance of considerations not addressed by § 3(h).

That limitation is not one having peculiar applicability to television broadcasting. Its force is not diminished by the variant technology involved in cable transmissions. Cable operators now share with broadcasters a significant amount of editorial discretion regarding what their programming will include. As the Commission, itself, has observed, "both in their signal carriage decisions and in connection with their origination function, cable television systems are afforded considerable control over the content **of** the programming they provide." *Report and Order in Docket* **No.** *20829,* (1978). [FN17]

FN17. We do not suggest, nor do we find it necessary to conclude, that the discretion exercised by cable operators is of the same magnitude as that enjoyed by broadcasters. Moreover, we reject the contention that the Commission's access rules will not significantly compronuse the editorial discretion actually exercised by cable operators. At least in certain instances the access obligations will restrict expansion of other cable services. See nn. 2, 3, *supra.*

And even when not occasioning the displacement of alternative programming, compelling cable operators indiscriminately to accept access programming will interfere with their determinations regarding the total service offering to be extended to subscribers.

***708** In determining, then, whether the Commission's assertion of jurisdiction is "reasonably ancillary to the effective performance of [its] various responsibilities for the regulation of television broadcasting," *United States v. Southwestern Cable Co.*, 392 U.S., at 178, 88 S.Ct., at 2005. we are unable to ignore Congress' stern disapproval—evidenced in S 3(h)--of negation of the editorial discretion otherwise enjoyed by broadcasters and cable operators alike. Though the lack of congressional guidance has in the past led us to defer--albeit cautiously--to the Commission's judgment regarding the scope of its authority, here there are strong indications that agency flexibility was to he sharply delimited.

[4][5] The exercise of jurisdiction in *Midwest Video*, it has been said, "strain[ed] the outer limits" of Commission authority. 406 U.S., at 676, 92 S.Ct., at 1874 (Burger, C. J., concurring in result). In light of the hesitancy with which Congress approached the access issue in the broadcast area, and in view of its outright rejection of a broad right of public access on a common-carrier basis, we are constrained to hold that the Commissiott exceeded those limits in promulgating its access rules. [FN18] The ***709** Commission ****1446** may not regulate cable systems as common carriers, just as if may not impose such obligations on television broadcasters. We think authority to compel cable operators to provide common carriage of public- originated transmissions must come specifically from Congress. [FN19]

FN18. The Commission has argued that the capacity, access, and facilities regulations should not be reviewed as a unit, but as discrete rnles entailing unique considerations. But the Commission concedes that the facilities and access rules are integrally related, see Brief for Petitioner in No. 77-1575, p. 36 n. 32, and acknowledges that the capacity rnles were adopted in part to complement the access requirement, see *id*, at 35; *1976 Order*, 59 F.C.C.2d, at 313, 322. At the very least it is unclear whether any particular rule or portion thereof would have been promulgated in isolation. Accordingly, we affirm the lower court's determination to set aside the amalgam of rules without intimating any view regarding whether a particular element thereof might appropriately be revitalized in a different context.

FN19. The court below suggested that the Commission's rules might violate the First Amendment rights of cable operators. Because our decision rests on statutory grounds, we express no view on that question, save to acknowledge that it is not frivolous and to make clear that the asserted constitutioiial issue did not determine or sharply influence our construction of the statute. The Court of Appeals intimated, additionally, that the rules might effect an unconstitutional "taking" of property or, by exposing a cable operator to possible criminal prosecution for offensive cahlecasting by access users over which the operator has no control, might affront the Due Process Clause of the Fifth Amendment. We forgo comment on these issues as well.

Affirmed.

Mr. Justice STEVENS, with whom Mr. Justice BRENNAN and Mr. Justice MARSHALL join, dissenting.

In 1969, the Commission adopted a rule requiring cable television systems to originate a significant number of local programs. In *United States v. Midwest Video Corp.*, 406 U.S. 649, 92 S.Ct. 1860, 32 L.Ed.2d 390, the Court upheld the Commission's authority to promulgate this "mandatory origination" rule. Thereafter, the Commission decided that less onerous rules would accomplish its purpose of "increasing the number of outlets for community self-expression and augmenting the public's choice of programs and types of services." [FN1] Accordingly, it adopted the access rnles that the Court invalidates today. [FN2]

FN1. The quotation is from the report accompanying the promulgation of the 1969 rules. See *First Report and Order*, 20 F.C.C.2d 201, 202 (1969) *(1969 Order)*. The report accompanying the 1976 rules identifies precisely the same numose. See *Report and Order IN Docket '20508.* 59 F.C C 2d 294.298 (1976) (App 103).

FN2. By the time of this Court's decision in *Midwest Video,* the Commission had adopted limited-access and channel-capacity rules. See *Cable Television Report and Order in Docket No. 18397.. 36* F.C.C.2d 143 (1972); *American Civil Liberties Union v. FCC,* 523 F.2d 1344 (CA9 1975). In 1974, the Commission largely repealed the mandatory origination rule at issue in *Midwest Video* on the grounds that access was found to be a less burdensome and equally effective means of furthering the same statutory objectives. See *Report and Order in Docket No. 19988.* 49 F.C.C.2d 1090. 1099-1 100, 1104-1106 (1974). The 1972 access rules were reviewed and amended in 1976, see *Report and Order in Docket No. 20508, supra,* and it is these rules that are at issue here.

*710 In my opinion the Court's holding in *Midwest Video* that the mandatory origination rules were within the Conmission's statutory authority requires a like holding with respect to the less burdensome access rules at issue here. The Court's contrary conclusion is based on its reading of § 3(h) of the Act as denying the Commission the power to impose common-carrier obligations on broadcasters. 1 am persuaded that the Court has misread the statute.

Section 3(h) provides: " 'Common carrier' or 'carrier' means any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio or interstate or foreign radio transmission of energy, except where reference is made to common carriers not subject to this chapter; but a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier." 47 U.S.C. § 153(h).

Section 3 is the definitional section of the Act. It does not purport to grant or deny the Commission any substantive authority. Section 3(h) makes it clear that every broadcast station is not to be *deemed* a common carrier, and therefore subject to common-carrier regulation under Title II of the Act, simply because it is engaged in radio broadcasting. But nothing in the words of the statute or its legislative history suggests that § 3(h) places limits on the Commission's exercise of powers otherwise within its statutory authority because *711 a **1447 lawfully imposed requirement might be termed a "common carrier obligation." [FN3]

FN3. The Senate Report on the Communications Act of 1934, for example, simply stated:
"Section 3: Contains the definitions. Most of these are taken from the Radio Act, the Interstate Commerce Act, and international conventions." S.Rep.No.781, 73d Cong., 2d Sess., 3 (1934).
The House Report was only slightly more detailed; as to § 3(h), it explained:
"Since a person must be a common carrier for hire to come within this definition, it does not include press associations or other organizations engaged in the business of collecting and distributing news services, which may refuse to furnish to any person service which they are capable of furnishing, and may furnish service under varying arrangements, establishing the service to he rendered, the terms under which rendered, and the charges therefor." H.R.Rep.No.1850, 73d Cong., 2d Sess., 4 (1934).
Finally, the Confereuce Report "noted that the detinition does not include any person if not a common carrier in the ordinary sense of the term." H.R.Conf.Rep.No.1918, 73d Cong., 2d Sess., 46 (1934).
Section 3(h), it seems clear to me, cannot be read to be directly applicable to cable systems in any regard. Such system are not, in the full range of their activities, "common carrier[s] in the ordinary sense of the term." And, as relevant here, they are technically not broadcasters at all; what they are engaged in is the distinct process of "cablecasting." See. *1969 Order, supra,* at 223.

The Commission's understanding supports this reading of § 3(h). In past decisions interpreting FCC authority under the Communications Act, "we

[have been] guided by the 'venerable principle that the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong.' " *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94, 121, 93 S.Ct. 2080, 2096, 36 L.Ed.2d 772, quoting *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 381, 89 S.Ct. 1794, 1801, 23 L.Ed.2d 371. The Commission's construction of § 3(h) is clear: it has never interpreted that provision, or any other in the Communications Act, as a limitation on its authority to impose common-carrier obligations on cable systems.

"**712** The Commission's 1966 rules, which gave rise to this Court's decision in *United States v. Southwestern Cable Co.*, 392 U.S. 157, 88 S.Ct. 1994, 20 L.Ed.2d 1001, imposed just such an uhligation. Under those rules, local systems were required to carry, upon request and in a specific order of priority, the signals of broadcast stations into whose viewing area they bring competing signals. [FN4] And its 1969 rules, according to the FCC Report and Order, reflected the Commission's view "that a multi-purpose CATV operation combining carriage of broadcast signals with program origination and common carrier services, might best exploit cable channel capacity to the advantage of the public and promote the basic purpose for which this Commission was created." [FN5] Finally, in adopting the rules at issue here, the Commission explicitly rejected the rationale the Court accepts today:

> FN4. See *Second Report and Order in Docket 14895*, 2 F.C.C.2d 725 (1966). The *Southwestern Cable* Court did not pass unon the validity of these rules. Mr. Justice Brennan's opinion for the plurality in *United States v. Midwest Video Corp.*, 406 U.S. 649, 659 n. 17, 02 S.Ct. 1860, 1866, noted that "[t]heir validity was, however, subsequently and correctly upheld by courts of appeals as within the guidelines of that decision. See, *e. g., Black Hills Video Corp. v. FCC*, 399 F.2d 65 (CA8 1968)."
>
> FN5. 1969 Order, 20 F.C.C.2d, at 202. See also *United States v. Midwest Video Corp., supra*, at 654 n. X. 92 S.Ct., at I863 (plurality opinion):
> "Although the Connnission did not impose common carrier obligations on CATV systems in its 1969 report, it did note that 'the origination requirement will help ensure that origination facilities are available for use by others originating on leased channels.' First Report and Order 209. Public access requirements were introduced in the Commission's Report and Order on Cable Television Service, although not directly under the heading of common-carrier service. See [Report and Order on Cable Television Service] 3277."
>
> "So long as the rules adopted are reasonably related to achieving objectives for which the Commission has been assigned jurisdiction we do not think they can be held beyond our authority merely by denominating them as somehow 'common carrier' in nature. The proper question, ***713** we believe, is not whether they fall in one ****1448** category or another of regulation—whether they are more akin to obligations imposed on common carriers or obligations imposed on broadcasters to operate in the public interest—but whether the rules adopted promote statutory objectives." 59 F.C.C.2d 294, 299 (1976).

In my judgment, this is the correct approach. *Columbia Broadcasting System, Inc. v. Democrntic National Committee, supra*, relied upon almost exclusively by the majority, is not to the contrary. In that case, we reviewed the provisions of the Communications Act, including § 3(h), which had some bearing **on** the access question presented. We emphasized, as does the majority here, that "Congress has time and again rejected various legislative attempts that would have mandated a variety of forms of individual access." 412 U.S., at 122, 93 S.Ct., at 2096. But we went on to conclude: "That is not to say that Congress' rejection of such proposals must be taken to mean that Congress is opposed to private rights of access under all circumstances. *Rather. the point is that Congress hns chosen to leave such questions with the Commission, to which it has given the flexibility to experiment with new ideas as changing conditions require." Ibid.* (emphasis added). [FN6]

> FN6. While the Court in *Columbia Broadcasting System, Inc. v. Democratic National Committee*, went on to reject the claim that the Commission's refusal to require broadcasters to accept paid political advertisements was unconstitutional, it also recognized that "[c]onceivably at some

> future date Congress or the Commission--or the broadcasters--may devise some kind of limited right of access that is both practicable and desirable" and noted the rules at issue here **as** an example. 412 U.S., at 131, 93 S.Ct., at 2100.

The Commission here has exercised its "flexibility to experiment" in choosing to replace the mandatory origination rule upheld in *Midwest Video* with what it views **as** the less onerous local access rules at issue here. I have no reason to doubt its conclusion that these rules, like the mandatory origination rule they replace, do promote the statutory objectives of "increasing the number of outlets for community self-expression ***714** and augmenting the public's choice of programs and types of services." And under this Court's holding in *Midwest Video*, this is all that **is** required to uphold the jurisdiction of the Commission to promulgate these rules. Since Congress has not seen fit to modify the scope of the statute **as** construed in *Midwest Video*, I would therefore reverse the judgment of the Court of Appeals for the Eighth Circuit and remand the case with instructions to decide the constitutional issue.

99 S.Ct. 1435, 440 U.S. 689, 59 L.Ed.2d 692, 45 Rad. Reg. 2d (P & F) 581, 4 Media L. Rep. 2345

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United States Court of Appeals,
District of Columbia Circuit.

SOUTHWESTERN BELL TELEPHONE COMPANY, Petitioner,
v.
FEDERAL COMMUNICATIONS COMMISSION and United States of America, Respondents,
EDS Corporation, Ameritech Operating Companies, Metropolitan Fiber Systems,
Pacific Bell and Nevada Bell, WilTel, Inc., Bell Atlantic Telephone Companies,
NYNEX, MCI Teleconununications Corporation, Intervenors.
SOUTHWESTERN BELL TELEPHONE COMPANY, Petitioner,
v.
FEDERAL COMMUNICATIONS COMMISSION and United States of America, Respondents,
EDS Corporation, Metropolitan Fiber Systems,
Pacific Bell and Nevada Bell,
WilTel, Inc., Bell Atlantic Telephone Companies,
NYNEX, MCI Telecommunications Corporation, Intervenors.
U S WEST COMMUNICATIONS, INC., Petitioner,
v.
FEDERAL COMMUNICATIONS COMMISSION and United States of America, Respondents,
Bell Atlantic Telephone Companies, NYNEX, Ameritech Operating Companies,
Southwestern Bell Telephone Company, WilTel, Inc., Pacific Bell and Nevada
Bell, MCI Telecommunications Corporation, Metropolitan Fiber Systems, Inc.,
Intervenors. (Two Cases)
SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY and South Central Bell Telephone
Company, Petitioners,
v.
FEDERAL COMMUNICATIONS COMMISSION and United States of America, Respondents,
NYNEX, Ameritech Operating Companies, Southwestem Bell Telephone Company,
WilTel, Inc., MCI Telecommunications Corporation, Pacific Bell and
Nevada Bell, Metropolitan Fiber Systems, Inc., Bell Atlantic Operating
Companies, Intervenors. (Two Cases)
The BELL ATLANTIC TELEPHONE COMPANIES, Petitioners,
v.
FEDERAL COMMUNICATIONS COMMISSION and United States **of** America, Respondents,
NYNEX, Ameritech Operating Companies, Southwestern Bell Telephone Company,
WilTel, Inc., MCI Telecommunications Corporation, Pacific Bell and
Nevada Bell, Metropolitan Fiber Systems, Inc., Intervenors. (Two Cases)
U S WEST COMMUNICATIONS, INC., BellSouth Telecommunications, Inc., Bell
Atlantic Telephone Companies, Southwestern Bell Telephone Company, Petitioners,
v.
FEDERAL COMMUNICATIONS COMMISSION and United States of America, Respondents,
WilTel, Inc., EDS Corporation, International Business Machines Corporation,
Intervenors.

Nos. 91-1416, 91-1417, 91-1440, 91-1446, 91-1447, 91-1453, 91-1454 and **93-1360.**

Argued Jan. 31, 1994.
Decided April 5, 1994.

Local exchange carriers challenged series of Federal Communications Commission (FCC) orders which prescribed rates for "dark fiber" communications services, which involved offering fiber optic lines without necessary electric equipment to power the fiber. The Court of Appeals, Wald, Circuit Judge, held that FCC provided insufficient support for concluding that local exchange carriers offered "dark fiber" service on common carrier basis.

Remanded

West Headnotes

[1] Telecommunications 5.1

Whether entity in given case is to be considered common carrier, subject to Federal Communications Commission (FCC) jurisdiction, or private carrier turns on particular practice under surveillance; if carrier chooses its clients on individual basis and determines in each particular case whether and on what terms to serve and there is no specific regulatory compulsion to serve all indifferently, entity is "private carrier" for that particular service and FCC is not at liberty to subject entity to regulation as common carrier. Communications Act of 1934, § § 201-227, as amended, 47 U.S.C.A. § § 201- 227.

[2] Telecommunications 5.1
372k5.1

While Federal Communications Commission (FCC) may look to public interest in fine-tuning its regulatory approach, it may not impose common carrier status upon any given entity on basis of desired policy goal FCC seeks to advance. Communications Act of 1934, § § 201-227, as amended, 47 U.S.C.A. § § 201-227.

[3] Telecommunications 307.1
372k307.1

Mere fact that local exchange carriers were common carriers with respect to some forms of telecommunication, such as offering local telephone service, did not relieve Federal Communications Commission (FCC) of supporting its conclusion that local exchange carriers provided "dark fiber" service on common carrier basis when they entered into individually tailored service contracts to provide fiber optic lines without necessary electronic equipment to power the fiber. Communications Act of 1934, § § 201-227, as amended, 47 U.S.C.A. § § 201-227.

[4] Telecommunications 5.1
372k5.1

Carrier cannot vitiate its common carrier status, and avoid Federal Communications Commission (FCC) jurisdiction, merely by entering into private contractual relationships with its customers. Communications Act of 1934, 8 8 201-227, as nmended, 47 U.S.C.A. § § 201-227.

[5] Telecommunications 307.1
372k307.1

Local exchange carriers' tiling of individually tailored contracts to provide "dark fiber" services to specific customers on individual case basis did not, without more, provide Federal Communications Commission (FCC) with common carrier jurisdiction over such provision of fiber optic lines without nccessary electronic equipment to power the fiber. Communications Act of 1934, § § 201-227, as amended, 47 U.S.C.A. § § 201-227.

"1477 **274 Petition for Review of an Order of the Federal Communications Commission.

Robert B. McKenna, Denver, CO, argued the cause, for petitioners. With him on the briefs were Robert M. Lynch, Richard C. Hartgrove, Robert J. Gryzmala, St. Louis, MO, M. Robert Sutherland, Atlanta, GA, and Lawrence W. Katz, Washington, DC. Leo J. Bub, San Antonio, TX, entered an appearance in No. 91-1416. William B. Barfield and R. Frost Branon, Jr., Atlanta, GA, entered appearances in Nos. 91-1446 and 91-1447. John Thorne, Michael D. Lowe. Washington, DC, J. Manning Lee, McLean, VA, Mark J. Mathis, Philadelphia, PA, James R. Young and Lawrence W. Katz, Washington, DC, entered appearances in Nos. 91-1453 and 91-1454. Durward D. Dupre, St. Louis, MO, entered an appearance in No. 93-1360.

Laurence N. Bourne, Counsel, F.C.C., Washington, DC, argued the cause, for respondents. With him on the brief was Renee Licht, Acting General Counsel, F.C.C., Daniel M. Armstrong, Associate General Counsel, F.C.C., John E. Ingle, Deputy Associate General Counsel, F.C.C., Anne K. Bingaman, Asst. Atty. Gen., U.S. Dept. of Justice, Robert B. Nicholson and Robert J. Wiggers, Attorneys, U.S. Dept. of Justice, Washington, DC.

On the joint brief for intervenors Electronic Data Systems Corp., MCI Telecommunications Corp., and WilTel, Inc., were Randolph J. May, Richard S. Whitt, Frank W. Krogh, Donald J. Elardo, Eric Fishman and William L. Fishman, Washington, DC. Floyd S. Keene, Milwaukee, WI, Alfred Winchell Whittaker, Andrew D. Lipman, Washington, DC, James P. Tuthill, Margaret deB. Brown, John W. Bogy, Stanley J. Moore, San Francisco, CA, John Thorne, Michael D. Lowe. Washington, DC, J. Manning Lee, McLean, VA, Mark J. Mathis, Philadelphia, PA, Donald W. Boecke, William T. Lake, J. Roger Wollenberg, Washington, DC, entered appearances.

Before: MIKVA, Chief Judge, WALD and EDWARDS, Circuit Judges.

Opinion for the Court filed by Circuit Judge WALD.

WALD, Circuit Judge:

Petitioners Southwestern Bell Telephone Company, US West Communications, Inc., BellSouth Telecommunications, Inc., and the Bell Atlantic Telephone Companies challenge **a** series of Federal Communications Commission ("FCC" or

"Commission") orders which prescribed rates for so-called "dark fiber" communications services, directed petitioners to provide these services as a general offering, and, finally, denied permission to withdraw dark fiber service altogether. *In re Bell Atlantic Tel. Cos. Revisions to Tariff F.C.C. No. 1*, **6** F.C.C.R. 1436 (1991) ("Suspension Order"), 6 F.C.C.R. 4776 (1991) ("Suspension Review Order"), 6 F.C.C.R. 4891 (1991) ("Prescription Order"); ***In re*** *Southwestern Bell Tel. Co.*, 8 F.C.C.R. 2589 (1993) ("Section 214 Order") (refusing permission to withdraw offering). Petitioners claim that in issuing these orders the FCC exceeded its jurisdiction because they had offered dark fiber only on an individualized basis, thereby placing this service beyond the FCC's authority over common carrier offerings under title 11 of the Communications Act of 1934, as amended, 47 U.S.C. § § 201-227 (1988 & Supp. III 1991). We find that the Commission has not sufficiently supported its conclusion that petitioners' dark fiber service was ever offered on a conimon carrier basis and accordingly remand to the Commission for reconsideration of its orders.

***1478 **275** I. BACKGROUND

A. *Facts and Procedural History*

In the 1970s scientists explored the possibility of transmitting information by sending light waves in the form of a coucentrated laser beam through glass fibers. This method of communication proved far superior to the conventional forms of transmission of information via copper, coaxial cable, and microwave. Petitioners began to provide fiber optic telecommunications services on an individualized basis in 1985. Their initial "DS3" service combined high speed transmission equipment and associated fiber optic cable tailored to the specific needs of each customer. However, because of the specific characteristics *of* fiber optic technology, the electronic and other equipment necessary to power or "light" the glass fiber may be installed at either or both ends of the fiber. This feature permits petitioners to offer the fiber optic lines alone and allow subscribers to use customized equipment at their own end to send information along these routes. The provision of the fiber optic lines without the necessary electronic equipment to power the fiber is commonly known as "dark" fiber service, and is distinguishable from the original DS3 service for which petitioners light the fiber on behalf of their customers.

With the permission of'the FCC, petitioners offered dark and lit fiber service, as well as certain other special services, on an individual case basis ("ICB") where each service contract was negotiated separately and specifically tailored to the particular needs of each customer. See *In re Investigation of Access and Divestiture Related Tariffs*, 97 F.C.C.2d 1082, 1143 (1984). These ICB contracts were then filed with the FCC. [FN1] In early 1988 the Bell Atlantic Telephone Companies and other Local Exchange Carriers ("LECs") proposed revisions to their ICB rates for DS3 (lit fiber) service which triggered an FCC investigation into whether these tariffs exhibited "unjust or unreasonable discrimination" in violation of section 202(a) of the Communications Act, 47 U.S.C. § 202(a). ***See*** *In re* ***Local*** *Exchange Carriers' Individual Case Basis DS3 Service Offerings*, 4 F.C.C.R. 8634 (1989) ("ICB Order").

FN1. We are unable to determine with any confidence exactly why these ICB contracts were filed with the FCC. At oral argument, petitioners declared that the ICBs (or at least a large portion thereof) were filed pursuant to their obligation under 47 **U.S.C.** § 211(a) to file "all contracts ... with other carriers." *See* Transcript **of** Oral Argument 28- 29. However, counsel for the FCC maintained that while the Commission bad never ordered the filing of ICBs, the modified final judgment in the AT & T divestiture case imposed a general line of business restriction on regional operating companies, such as petitioners, limiting these to tariffed monopoly services. *See United States v. American Tel. and Tel. Cu.*, 552 F.Supp. 131. 228 (D.D.C.1982), *aff'd sub* ***nom.*** *Maryland* ***v.*** *United States*, 460 U.S. 1001, 103 S.Ct. 1240, 75 L.Ed.2d 472 (1983). While this restriction was lifted in 1987, ***see*** *United States v. Western Elec. Co.*, 673 F.Supp. 525. 597-604 (D.D.C.1987), *aff'd* ***in*** *part, rev'd in part*, 900 F.2d 283 (D.C.Cir.1990), the FCC noted during oral argument that because of the modified final judgment "there [was] arguably some compulsion" to file ICB tariffs with the FCC when they initially began offering dark fiber in 1984. *See* Transcript of Oral Argument 28. The Commission has never attempted *to* explain how this compulsion relates to its conclusion that filing ICBs inevitably constitutes an offer of common carriage.

At the conclusion of that investigation, the

Commission explained that " 'ICB' pricing is usually used when a carrier adopts a practice of developing a price for a particular service or facility in response to each customer request for the service or facility." *ICB Order,* 4 F.C.C.R. at 8641 ¶ 63. While it was theoretically possible to construct nondiscriminatory ICB tariffs, the Commission "presume[d] that ICB pricing ... is discriminatory." *Id.* at 8642 ¶ 67. Therefore "once exchange carriers have sufficient experience with a service such as the provision of DS3 [lit fiber] facilities to permit the development of avcraged rates, they must file such rates." *Id.* at 8642 ¶ 68. Accordingly, it ordered those companies with sufficient DS3 experience to tile averaged tariffs for their lit fiber service, [FN2] but refrained from requiring the LECs to file averaged tariffs for dark fiber because of the carriers' apparent lack of experience in that area. *Id.* at 8645 ¶ **88.**

FN2. Petitioners do not challenge the FCC's determination with respect to DS3 lit fiber here.

***1479 **276** On reconsideration, the Commission dccided on the basis of new information that several carriers indeed had "sufficient experience in the provision of dark fiber service to support the development of averaged rates." *In re Local Exchange Carriers' Individual Case Basis DS3 Service Offerings,* 5 F.C.C.R. 4842, 4845 ¶ **31** (1990) ("ICB Reconsideration Order"). While the record upon which the original ICB Order was based identified only 20 or so dark fiber ICBs, the Commission subsequently learned that Southwestern Bell had more than 120 dark fiber ICBs, Bell Atlantic had four ICBs consisting of 32 dark fibers in addition to 52 ICBs (any of which may involve more than one dark fiber installation), BellSouth had nine ICBs consisting of 34 fibers, and U S West had at least 12 ICBs consisting of 52 fibers. *ICB Reconsideration Order.* 5 F.C.C.R. at 4845 ¶ 32.

In deciding to exercise title II jurisdiction over petitioners' dark fiber service, the Commission declined to examine the specific circumstances surrounding these offerings. Instead, the FCC dccided that by filing the ICBs the carriers had acceded to the common carriage status necessary to support the Commission's jurisdiction. ***Id.*** at 4847 n. 15. Accordingly, the FCC ordered these carriers to "offer dark fiber as a generally available service at avcraged rates[,] ... to amend their dark fiber ICBs to terminate not later than one year from the release of this [Reconsideration] Order[, and] ... to file general rates for dark fiber service." *Id.* at 4845 ¶ **33.**

Denied a waiver of the order, *In re Local* ***Exchange*** *Carriers' Individual Case Basis DS3 Service Offerings,* 5 F.C.C.R. 6772 (1990), petitioners filed averaged rates purportedly complying with the Reconsideration Order. The FCC, however, suspended the filed rates in part and prescribed new rates. *Suspension Order,* 6 F.C.C.R. 1436; *Suspension Review Order. 6* F.C.C.R. 4776, *Prescription Order, 6* F.C.C.R. 4891. Subsequently, the FCC denied petitioners permission to withdraw from the dark fiber market because petitioners had not borne their burden of showing that such a withdrawal would not adversely affect public convenience or necessity. *Section 214 Order, 8* F.C.C.R. 2589. Petitioners now challenge the Suspension, Prescription, and Section 214 Orders on the basis that the FCC lacked common carriage jurisdiction over the dark fiber service offerings, that the FCC exceeded its statutory authority in prescribing interim rates during the period of rate suspension, and that the FCC impermissibly relied on an *ex parte* communication in reaching its decision in the Section 214 Order. For reasons set forth below, we reach only the first contention and remand to the FCC for reconsideration of its authority to regulate dark fiber.

B. *Statutoy Framework*

The Communications Act of 1934 ("Act") established the Federal Communications Commission "for the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation- wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges." 47 U.S.C. § 151. The Act gives the Commission specific regulatory responsibilities regarding common carriers under title II of the Act, *id.* at § § 201-227, and broadcasting under title III, *id.* at § § 301-399b. In addition, the Commission has general regulatory jurisdiction over "all interstate and foreign communications by wire or radio ... and ... all persons engaged within the United States in such communication [except for communication in the Canal Zone]." *Id.* at § 152(a). The Commission's general jurisdiction over interstate communication and persons engaged in such communication, however, "is restricted to that reasonably ancillary to the effective performance of [its] various responsibilities" under titles II and III of

the Act. *United States v. Southwestern Cable Co.*, 392 U.S. 157, 178, 88 S.Ct. 1994, 2005, 20 L.Ed.2d 1001 (1968); *see also FCC v. Midwest Video Corp.*, 440 U.S. 689, 99 S.Ct. 1435, 59 L.Ed.2d 692 (1979); *United States v. Midwest Video Corp.*, 406 U.S. 649, 92 S.Ct. 1860, 32 L.Ed.2d 390 (1972).

The centerpiece of title II common carrier regulation is the supervision of filed tariffs. *1480 **277 Pursuant to title II, every common carrier must tile tariffs with the FCC for the communication services it provides. 47 U.S.C. § 203(a). Any charge for a common carrier service that is "unjust," "unreasonable," or "unreasonabl[y] discriminat[ory]" is unlawful and shall be so declared by the Commission. *Id.* at § § 201(b), 202(a). Whenever a common carrier files a new or revised tariff, the Commission may suspend the charge for a period of tive months, conduct an investigation into the lawfulness of the charge, and prescribe rates after holding appropriate hearings. *Id.* at § 204. The Commission may also suspend any existing charge and issue a cease and desist order prescribing the proper charge to be collected, provided the FCC has conducted a full hearing and concluded the existing charge to be unlawful. *Id.* at § 205. Finally, section 214 provides that "[n]o carrier shall discontinue, reduce, or impair service ... unless and until there shall first have been obtained from the Commission a certificate that neither the present nor future public convenience and necessity will be adversely affected thereby." *Id.* at § 214(a).

All of the described regulation of tariffs under title II of the Act, however, hinges upon the premise that the regulated entity is a common carrier. Yet, the Communications Act itself does not define the specific characteristics of a common carrier and basically just repeats the term in its definition of a common carrier as "[a]ny person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio." *Id.* at § 153(h). Similarly, the Commission's regulatory interpretation of the Act simply provides that a communication common carrier is "any person engaged in rendering communication service for hire to the public." 47 C.F.R. § 21.2 (1992). As a result, noting that "the circularity and uncertainty of the common carrier dcfiiiitions set forth in the statute and regulations invite recourse to the common law of carriers," reviewing courts have fashioned the following two-part test for common carriage:

> [T]he primary *sine qua non* of common carrier status is a quasi-public character, which arises out of the undertaking to carry for all people indifferently. This docs not mean that the particular services offered must practically be available to the entire public; a specialized carrier whose service is of possible use to only a fraction of the population may nonetheless be a common carrier if he *holds himself out to serve indifferently all potential users*....
>
> A second prerequisite to common carrier status [is] ... that the system be such that customers transmit intelligence of their own design and choosing.

National Ass'n of Regulatory Util. Comm'rs v. FCC, 533 F.2d 601, 608-09 (D.C.Cir.1976) ("*NARUC II*") (internal quotes and footnotes omitted) (emphasis added). *See also National Ass'n of Regulatory Util. Comm'rs v. FCC*, 525 F.2d 630 (D.C.Cir.) ("*NARUC I*"), *cert. denied*, 425 U.S. 992, 96 S.Ct. 2203, 48 L.Ed.2d 816 (1976). We use that test today.

II. DISCUSSION

The legality of the orders on review ultimately rests upon the validity of treating petitioners' dark fiber service as a common carrier offering subject to full regulation under title II of the Communications Act. Petitioners became entangled in the FCC's web of common carrier regulation solely by virtue of filing the ICB contracts. Without examining the actual contours of the dark fiber offerings represented by the ICBs, the Commission imposed upon petitioners its full regulatory power under title II. Without pointing to any specific legal or regulatory obligation that would require petitioners to provide dark fiber on a common carrier basis, the FCC categorically maintains that filing any tariff, including ICB contracts, with the Commission "necessarily constitute[s] a commitment to offer the service on a common carrier basis." Brief for Respondents at 28. According to the Commission, the ICB arrangements--whether for dark or lit fiber--were merely a pricing mechanism and did not affect the indiscriminate nature of the offering itself. Therefore, the Commission concludes, it had jurisdiction to order the filing of averaged tariffs, to suspend the filed tariffs and prescribe appropriate rates, and to deny permission to withdraw the dark fiber offering altogether. Without expressing **278 *1481 any opinion on whether the Commission may have a *different* and adequate reason for regulating dark fiber, we are not satisfied with the logic underlying the orders as they stand now.

[1][2] Whether an entity in a given case is to be considered a common carrier or a private carrier turns

on the particular practice under surveillance. **If** the carrier chooses its clients on an individual basis and determines in each particular case "whether and on what terms to serve" and there is no specific regulatory conipulsion to serve all indifferently, the entity is a private carrier for that particular service and the Commission is not at liberty to subject the cntity to regulation **as a** common carrier. *NARUC II,* 533 F.2d **at** 608-09; *NARUC I,* 525 F.2d at 643. While the Commission may look to the public interest in fine-tuning its regulatory approach, it may not impose common carrier status upon any given entity on the basis of the desired policy goal the Commission seeks to advance. *NARUC I,* 525 F.2d at 644. Since the parties evidently agree that dark fiber customers transmit intelligence of their own dcsign, we need only address the application of the first part of the *NARUC II* test.

A. *Private Contract-Based Services Offered by Common Carriers*

[3] The mere fact that petitioners are common carriers with respect to some forms of telecommunication does not relieve the Commission from supporting its conclusion that petitioners provide dark fiber on a common carrier basis. As we said in *NARUC II,* "it is at least logical to conclude that one can be a common carrier with regard to some activities but not others." 533 F.2d at 608. Undoubtedly, private interstate communications services rendered by a common carrier remain within the purview of the FCC, if only pursuant to the Commission's general title I jurisdiction which authorizes FCC regulation that is "reasonably ancillary" to the exercise of specifically delegated powers under the Act *Southwestern Cable* Co , 392 U S at 178, 88 S Ct at 2005, *NARUC II,* 533 F.2d at 612. However, the specific regulation of rates under title II of the Act and the requirement to obtain permission prior to withdrawal of service pursuant to section 214 do not, without more, apply to the private service offered by a sometime common carrier.

Petitioners offered certain telecommunications services on a common carrier basis, *e.g.*, ordinary telephone service. Their entry into the dark fiber market, however, began as **a** limited, customer-specific service. The FCC originally had permitted petitioners to provide special services, including dark fiber, on an ICB basis without filing conventional tariffs until the carriers "develop rates or generally applicable regulations for these facilities." *Investigation of Access **and** Divestiture Related Tariffs,* 97 F.C.C.2d at 1143. These ICB service contracts were individually tailored arrangements negotiated to last for periods of five to ten years. As an initial matter, therefore, they were not like the indiscriminate offering of service on generally applicable terms that is the traditional mark of common carrier service. *See NARUC I, 525* F.2d at 643.

[4] To be sure, a carrier cannot vitiate its common carrier status merely by entering into private contractual relationships with its customers. *Akron, C. & Y. R.R. v. Interstate Commerce Comm'n,* 611 F.2d 1162, 1167 (6th Cir.1979), *cert. denied,* 449 U.S. 830, 101 S.Ct. 97, 66 L.Ed.2d 34 (1980); *see also MCI Telecommunications Corp. v. FCC,* 917 F.2d 30. 38 (D.C.Cir.1990). But at the same time, it does not make sense that the filing of the terms of any contract--no matter how customer tailored--with the FCC, without more, reflects **a** conscious decision to offer the service to **all** takers on a common carrier basis. There is no inherent inconsistency in recognizing that *some* filings of contracts may be just that: the filing of private contracts for private carriage. Indeed, to decide otherwise would be inconsistent with FCC precedent and the structure of the Communications Act.

B. *Filing Obligations Under Commission Precedent and the Communications Act*

[5] In 1984 the FCC commenced a rulemaking seeking "to modify [the Commission's] traditional common-carrier treatment of special construction of lines and special "**1482 **279** service arrangements." *In re Special Construction of Lines and Special Service Arrangements Provided by Common Carriers,* 97 F.C.C.2d 978, 981 (1984) ("Special Construction NPRM") (notice **of** proposed rulemaking) (footnotes omitted). Six years later, in 1990, the rulemaking was abandoned in a terse, four-paragraph order, stating only that the record originally compiled in support of the rulemaking had become stale. *In re Special Construction of **Lines** and Special Service Arrangements Provided by Common Carriers.* 5 F.C.C.R. 5410 (1990). Technically, therefore, the FCC has not disavowed its "traditional common-carrier treatment" of special service arrangements. Nonetheless, the Commission's Special Conshuction NPRM in 1984 reasoned "that there is no 'legal compulsion' fora carrier to provide special activities to the public indifferently under the Communications Act or [the FCC's] regulatory policies." 97 F.C.C.2d at 982. Without, of course, relying on the superseded Special Construction NPRM as support for today's holding, we pause to

note the contradiction between the reasoning espoused in 1984 and that contained in the rulemaking currently before us.

In this review, the FCC maintains that the filing of an ICB "is in no way related to, and in no way affects, the general availability of **a** service offering" and simply provides "a transitional method of pricing a tariffed service." *Section* 214 ***Order,*** 8 F.C.C.R. at 2594 ¶ 22. However, it flatly contradicted this view in 1984 saying that "[t]ypically, these [special construction] lines are individually tailored, constructed, *and* priced, ... in response to a customer's request where ordinary tariffed (generally *offered)* services would not satisfy that request." *Special Construction NPRM,* 97 F.C.C.2d at 978-79, 981 (emphasis added). Thus "[s]pecial service arrangements are different from, and do not include, services made generally available by the carrier." *Id.* at 991. Further supporting the private nature of ICB offerings, the Special Construction NPRM admitted:

> In at least one way, our rules already treat these special activities differently than common carrier offerings. We require the carrier to transmit to the customer **a** copy of the explanation and data supporting the rate tor special construction, special assembly equipment, and special service arrangements. This carrier-to-individual customer transfer of cost information is consistent with viewing these offerings as private dealings rather than general, indiscriminate offerings.

Id. at 989-90 (footnotes omitted). Back then, the Commission also recognized that even when special construction tariffs are filed with the FCC they do not automatically evolve into common carrier offerings. Instead, "special construction ... tariffs merely note a private contractual agreement between a carrier and an individual customer." *Id.* at 989 (footnote omitted).

In a recent rulemaking which adopted a new system of price cap regulation for the nation's largest local exchange carriers and which ***does*** constitute Commission precedent, the Commission unequivocally proclaimed that not all ICB offerings are indiscriminate offers of common carriage service. In the course of explaining why it declined to extend price cap regulation to all ICB offerings, the Commission discussed the relationship between ICBs and common carrier offerings:

> ICB offerings are those offered on **a** contract-type basis. While ICB offerings appear in LEC tariffs, they are not tariffed as generally-available, common carrier services. In some cases, ICB services feature new technology for which little demand exists. As demand for the service grows, the ICB offering can evolve into **a** generally-available offering, as has been the case with large, digital, fiber optic transmission facilities. [FN[3]] *In other applications, ICB offerings* are *simply unique service arrangements to meet* the ***needs*** *of specific customers* *****280 *1483*** that *will never evolve into generally-available* ***offerings.***
>
> FN3. The Price Cap Order cites the fiber optic rulemaking on review as its sole support for the factual conclusion that the fiber optic transmission facilities have evolved into common carrier offerings. It would be circular to rely on the Price Cap Order for any conclusion that dark fiber was offered on **a** common carrier basis. The importance of the quoted passage lies in the general recognition that an ICB can--but need not--evolve into a common carriage service.

In re *Policy and Rules Concerning Rates for Dominant Carriers,* 5 F.C.C.R. 6786, 6810 ¶ 193 (1990) ("Price Cap Order") (foolnotes omitted) (emphasis added). Moreover, we have upheld the FCC where it *detariffed* service elements that had been previously offered on **a** tariffed basis and initially treated as common carrier offerings, because upon further inspection they were determined not to he common carriage communications offerings within the meaning of the Act. *See* Computer and Communications Indus. Ass'n v. FCC, 693 F.2d 198 (D.C.Cir.1982), *cert. denied,* **361** U.S. 938, 103 S.Ct. 2109, 77 L.Ed.2d 313 (1983) (removing customer premises equipment from tariff) This would be difficult to explain if the mere filing of the terms of service with the FCC presented conclusive proof of common carriage regardless of the substance of the conditions on which the service is furnished. If the filing of service arrangements with the FCC were a sufficient indicator of common carriage, the Commission presumably could never conclude that a service once provided at a filed rate turned out not he **a** common carriage service upon further inspection.

To hold, as the FCC now urges, that any ICB filing with the Commission constitutes a holding out to all persons indifferently also would render problematic the Commission's statutory power under section 211 of the Connnunications Act. Section 211(b) permits the Commission "to require the filing of any ...

contract[ ] of any carrier." 47 U.S.C. § 211(b). It gives the Commission the power to require the filing of contracts for *private* service offerings in order to protect the integrity of *common* carrier regulation under the Act. As the Commission noted in 1984:

> Even if there is no 'legal compulsion' to provide special activities to the public indifferently, we tentatively conclude that they would fall within our ancillary jurisdiction. That is, we believe that we would have a continuing interest in obtaining information about these special services.... Offerings that are purportedly special activities hut which are in fact offered to the public indifferently may provide a carrier with a means to discriminate among its customers. The policies of [t]itle II would require the Commission to scrutinize a carrier's use of offerings by private contract to promote Just, reasonable, and nondiscriminatory charges for common carrier services.

Special Construction NPRM, 97 F.C.C.2d at 988 (citing 47 U.S.C. § 211) (footnotes omitted). We agree. To ensure that a common carrier's private service offerings do not undermine the regulation of its common carriage offerings, the FCC can require the carrier to file even those contracts that provide for customized private carriage. Indeed, in order to prevent carriers from circumventing title II regulation by crafting special service arrangements with other carriers, the Act itself mandates that a carrier file certain contracts--regardless of whether they constitute individualized or even unique service arrangements--whenever the customer is itself a carrier:

> Every carrier subject to this chapter shall file with the Commission copies of **all** contracts, agreements, or arrangements with other carriers, or with common carriers not subject to the provisions of this chapter, in relation to any traffic affected by the provisions of this chapter to which it may he a party.

47 U.S.C. § 211(a). If the Commission were permitted simply to deduce from the filing of any service contract that the service had been offered on a common carrier basis, section 211 would supply the bootstrap for title II common carriage rate regulation of virtually any service provided by an entity whenever that entity furnishes a portion of its services on a common carrier basis. The Communications Act could not have intended so to provide. While the Commission has ancillary jurisdiction over private offerings of common carriers under section 152 and may require common carriers to supply information regarding their private carriage offerings pursuant to section 211, only common carrier activity falls within the Commission's regulatory powers under title II. *MCI Telecommunications Corp. v. FCC*, 765 F.2d 1186, 1188 (D.C.Cir.1985); **1484**281 *Computer and Communications Indus. Ass'n*, 693 F.2d at 211.

III. CONCLUSION

The Communications Act delegates broad authority to the Commission to regulate constantly evolving communications facilities that have transcended in complexity and power far beyond the specific technologies known to its drafters in 1934. The emergence of these new technologies cannot be permitted to undermine the Commission's comprehensive, unified jurisdiction over interstate communications. *Southwestern Cable*, 392 U.S. at 172-73, 88 S.Ct. at 2002. Nonetheless, the Commission's expansive power under the Act does not include the "untrammelled freedom to regulate activities over which the statute fails to confer, or explicitly denies, Commission authority." *NARUC II*, 533 F.2d at 617. In order to regulate an activity under title II of the Communications Act, the Commission must first determine whether the service is being offered on a common carrier basis. In this instance, the Commission short-circuited any analysis of whether petitioners held themselves out indifferently to all potential users of dark fiber, by pronouncing an insupportable *per se* rule that a filing of a piece of paper with the FCC constitutes an offer of common carriage. We certainly do not impugn the intentions of the FCC to serve the public interest by regulating dark fiber, and we do not decide today whether the Commission may draw on other authority, such as its ancillary jurisdiction, to regulate petitioners' services. But we cannot permit the Commission to augment its regulatory domain, as it has attempted to do here, by redefining the elements of common carriage to include any service arrangement that is recorded with the FCC. Because we find that the Commission provided insufficient support for concluding that petitioners had offered dark fiber service on a common carrier hasis we remand the three orders to the Commission for reconsideration of the basis for its authority to regulate dark fiber service without reaching petitioners' other contentions. The orders on review are suspended pending completion of proceedings on remand.

Remanded.

19 F.3d 1475, 74 Rad. Reg. 2d (P & F) 1309, 305

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